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Boua v. Office of the Independent Police Review Director, 2024 ONSC 2172

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CITATION: Boua v. Office of the Independent Police Review Director, 2024 ONSC 2172
DIVISIONAL COURT FILE NO.: DC-22-503-JR
DATE: 20240418

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Nishikawa, O'Brien and Leiper JJ.

BETWEEN:	)	
	)	
IRENEE BOUA	)	*Self-Represented*
	)	
Applicant	)	
	)	
- and -	)	
	)	
OFFICE OF THE INDEPENDENT POLICE REVIEW DIRECTOR AND TORONTO POLICE SERVICE	)	*H. Mackay* for the Respondent, Office of the Independent Police Review Director
	)	
Respondents	)	
	)	**HEARD on** November 27, 2023 in Toronto by videoconference

REASONS FOR DECISION

THE COURT:

Overview

[1] In early August 2021, the police arrested and then released the applicant, Irénée Boua, after her ex-boyfriend called 911 when she entered his home just before midnight. Ms. Boua complained to the Office of the Independent Police Review Director ("OIPRD") about the conduct of the two Toronto Police Service ("TPS") officers that night. She alleged, among other things, that the officers used excessive force, unlawfully searched her purse and cell phone, used unnecessarily profane language and improperly questioned her immigration status. She also raised concerns about her inability to understand the officers, who were speaking in English, and that she was not provided with the reasons for her arrest in French. Her first language is French. The Director referred the investigation of the complaint to the TPS. The Chief of the TPS found one of the officers had used profane language but dismissed the balance of the complaint.

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[2] Ms. Boua requested that the Director conduct a review of the TPS investigation and decision. In her request for review, she alleged, among other things, that her language rights and right to counsel had been violated by the arresting officers. The Director raised two concerns in his review: (1) that Ms. Boua was not interviewed for the investigation; and (2) that the TPS investigation report did not address Ms. Boua's allegation that she was denied the opportunity to speak with counsel. He concluded that neither concern required remitting the investigation to the TPS. He specifically concluded that although it is generally preferable for the TPS to interview complainants, it was not necessary to remit the matter for Ms. Boua to be interviewed since he had the benefit of her detailed complaint and submissions on review, as well as the In-Car Camera System ("ICCS") recording from the night in question. He otherwise was satisfied that the TPS gathered the necessary relevant evidence and adequately addressed the allegations in the complaint.

[3] The question we address on this application is whether the Director's decision not to remit the matter to the TPS for Ms. Boua to be interviewed was reasonable. We conclude it was unreasonable for two reasons. First, the Director did not address a concern raised by both Ms. Boua and through the OIPRD triage process about whether Ms. Boua had been understood during the TPS investigation. While Ms. Boua's first language is French, the investigator spoke only English. Both Ms. Boua and the OIPRD case reviewer raised multiple concerns about possible miscommunication during the TPS investigation. This raised a question of fundamental fairness about the right to be heard, which the Director did not advert to in his reasons. Second, the Director unreasonably relied on having received Ms. Boua's submissions on the review to satisfy himself that he was able to understand her concerns. However, he did not review her submissions because they were submitted in French, a language he does not understand, and they were not translated into English.[1]

[4] We therefore remit the matter to the Director to reconsider his decision in accordance with these reasons.

Preliminary Issues

[5] We start by addressing three preliminary issues.

Request to Cross-Examine Paul Anderson

[6] The first preliminary issue is that before the hearing date, Ms. Boua brought a motion to cross-examine her ex-boyfriend, Paul Anderson, who had called the police on the night of the incident. Mr. Anderson was interviewed by the TPS for the investigation into Ms. Boua's complaint. The motion was heard by the panel in writing before the hearing of the application for judicial review. At the outset of the hearing, Nishikawa J. advised the parties that the motion for cross-examination was dismissed, with reasons to follow. The reasons are below.

[1] The question of whether Ms. Boua's rights under the *French Language Services Act*, R.S.O. 1990, c. F.32, might have been violated was not raised before us and we therefore do not address it.

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[7] Ms. Boua relied on Rule 39 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to cross-examine Mr. Anderson. Rule 39.02(1) states that "[a] party ... may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application." Mr. Anderson is not an adverse party on the application and did not provide an affidavit in this proceeding.

[8] As a general principle, the record on judicial review is restricted to the record that was before the decision-maker below: *Durham (Regional) Police Service v. Ontario Civilian Police Commission*, 2021 ONSC 2065, at para. 45. Fresh evidence may be permitted in limited circumstances, for example, to show there was an absence of evidence on an essential point, to disclose a breach of natural justice that cannot be proved using the record, or to provide general background that may assist the court in understanding the issues: *Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.). In a case management direction dated October 16, 2023, Ms. Boua was advised that the principles articulated in *Keeprite* would apply to her motion to cross-examine Mr. Anderson.

[9] Ms. Boua has failed to satisfy this court that the evidence to be elicited by cross-examining Mr. Anderson would fall within one of the exceptions articulated in *Keeprite*. Ms. Boua seeks to elicit Mr. Anderson's testimony about an inconsistency between what happened during the incident in question and what he said in his interview during the investigation by the TPS. She submits that Mr. Anderson stated during the interview that he did not see her being handcuffed but that she was clearly handcuffed before him. It is clear from the ICCS recording that Ms. Boua was handcuffed. The officers did not deny this and the OIPRD made no finding to the contrary. The issue was whether handcuffing her was consistent with TPS policy. Ms. Boua submits that the inconsistency in Mr. Anderson's evidence demonstrates a gap in the investigation or a lack of impartiality or fairness on the part of the OIPRD. However, it is unclear how any inconsistency in Mr. Anderson's response to the investigators demonstrates a lack of impartiality or fairness on the part of the OIPRD. As this is a judicial review of the OIPRD decision, Mr. Anderson's credibility is not at issue. For these reasons, the panel denied Ms. Boua's request to cross-examine Mr. Anderson.

Information to Challenge Recordings

[10] Ms. Boua included in her motion materials information from two people with knowledge of information technology. Their information addressed alleged alterations to the ICCS recording and the recording from the 911 call. Ms. Boua did not formally bring a motion seeking to admit this evidence. We agree with the Director's position that this information should be disregarded. The information was not sworn, no expert reports were served, and the individuals did not provide an acknowledgment of expert's duty. The Director did not have an opportunity to respond or challenge the information. Therefore, we have disregarded this information.

Request for Recusal

[11] The last preliminary issue is that after the hearing, Ms. Boua wrote to the court seeking the recusal of Nishikawa J. The panel advised that the motion would be heard in writing and directed a timetable for the parties to serve and file material on the motion. Ms. Boua then advised that she

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was not bringing a motion for recusal but had filed a complaint with the Canadian Judicial Council. As there was no motion for recusal, the panel remained seized of the application.

Jurisdiction and Standard of Review

[12] Ms. Boua's application seeks judicial review of the Director's decision, which was made pursuant to s. 71 of the *Police Services Act*, R.S.O. 1990, c. P.15. This court has jurisdiction over the application pursuant to ss. 2 and 6 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

[13] The standard of review for a review of the Director's decision is reasonableness: *Poyton v. OIPRD*, 2023 ONSC 428, at para. 14; *Green v. Toronto Police Service*, 2016 ONSC 6433, at para. 12.

Was the Director's decision not to remit the matter for Ms. Boua to be interviewed unreasonable?

[14] The Director submits he reasonably declined to remit the matter to the TPS for Ms. Boua to be interviewed. In his decision, he acknowledged that "[g]enerally speaking, it is preferable for investigators to interview complainants." However, he was satisfied he understood Ms. Boua's complaint for the following reasons:

> I have the benefit of Ms. Boua's detailed complaint and her submissions on this review, which I believe are sufficient to understand the scope of her complaint. I have also considered that almost the entirety of Ms. Boua's concerns have been captured by the ICCS recording. As a result, I will not be sending the matter back for an interview to take place.

[15] In the specific circumstances of this case, we find the Director's decision declining to remit the matter to the TPS for Ms. Boua to be interviewed was unreasonable.

[16] We start by acknowledging that there is no legal requirement to interview a complainant during a TPS investigation. Complainants are entitled to a comparatively low level of procedural fairness with respect to investigations because they are not facing a concrete impact to their rights and interests. It is the police officers who are at risk of findings of misconduct and the resulting consequences. Additionally, significant deference is owed to the procedure chosen by the TPS in its investigation. The law does not require a perfect investigation and courts are reluctant to interfere in an administrative decision-maker's investigative process unless there is bad faith or patent unfairness: *Korchinski v. Office of the Independent Police Review Director*, 2022 ONSC 6074, at para. 29. The standard the Director applies to review the TPS Chief's decision only requires the Director to consider: (1) whether the professional standards investigator adequately addressed the issues raised in the complaint; and (2) whether the findings of the TPS Chief were supported by the available evidence.

[17] That said, the circumstances of this case raised particular concern about procedural fairness because of the potential for miscommunication caused by language barriers. There was a serious

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concern that Ms. Boua had not been understood during the investigation process. The first way in which we find the Director's decision to be unreasonable is his failure to address this concern.

Failure to Address Miscommunications Caused by Language Barriers

[18] Ms. Boua, who was self-represented, repeatedly raised concerns about functioning in a different language from the police both during the incident in question and during the investigation process. The Director's own triage process also raised this as a significant issue of concern in the fairness of the investigation.

[19] Starting with concerns on the night in question, in her complaint, Ms. Boua stated that when the police first arrived at Mr. Anderson's home, they spoke to her rapidly in English and she did not understand everything that was said. She also complained that the police gave the reasons for her arrest very quickly in English. She stated that she should be able to know the reasons for her arrest in her first language. She also alleged the officers stated they did not believe she was unable to understand what they were saying in English.

[20] Ms. Boua also raised concerns about miscommunication throughout the TPS investigation. As set out in the TPS investigation report, she told the investigating officer, who was corresponding in English, that her English was not strong and that she was more comfortable communicating by email, which she was doing using translation application programs, or apps. When she was communicating with the officer about a potential meeting with him (which never occurred), she asked if she could be assisted by an interpreter. The investigating officer responded that an officer who speaks French would be present. Ms. Boua expressed concern that the officer who was assisting with translation might misinterpret her words.

[21] In her request for review to the Director, Ms. Boua raised further concerns. She noted that the TPS report had been drafted in English only. She stated that some of the phrases in English had lost their meaning when the report was translated into French. She also repeated the same concerns about the police officers' use of English on the night in question. She elaborated in her complaint that the police should have communicated with her in French, alleging that her French language rights were violated.

[22] In a triage report prepared by the OIPRD, the case reviewer raised a serious concern about the investigation, stating as follows:

> An in-depth analysis of this matter has not been undertaken by Investigations due to what we believe is an important preliminary issue. The Complainant's primary language is French… It is clear from a review of the Investigation Report that this investigation was not conducted with due regard to the Complainant's language requirements and was likely hampered by both the Investigator's lack of understanding of French and the use of a French-speaking constable as a "translator."

[23] The triage report detailed the specific concerns arising from the investigation as follows:

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- Ms. Boua was using translation apps to read what was being provided to her by the investigator.

- The investigator used an unofficial interpreter, who was another police officer, to assist, including to translate the complaint.

- The investigator was confused by Ms. Boua's submissions. The investigator was of the opinion that some of the correspondence was getting lost in translation between French to English and English to French. Ms. Boua expressed concern about not being interviewed either in-person or over the phone.

[24] We also note that the OIPRD's *Rules of Procedure* contemplate that interviews may take place during the course of an investigation. For example, the rules set out provisions for recording interviews and for representation during an interview. In other words, in the usual course, OIPRD investigations are not necessarily conducted entirely in writing. In this case, Ms. Boua, the complainant, was not interviewed, even though she had requested an interview. By contrast, a third party, Mr. Anderson, who speaks English, was interviewed.

[25] The case reviewer in the Director's office concluded the triage report with the following recommendations:

> I would suggest that proceeding with a detailed [request for review] at this point would be unfair. The Complainant should have the opportunity to both fully participate in the investigatory process and to understand the investigatory outcome. I would suggest that this matter be sent back to the Service so that (a) a French speaking investigator is assigned to the matter, (b) an interview is conducted of the Complainant by a French-speaking investigator and (c) an Investigation Report is provided to the Complainant in French. (April 12, 2022)

[26] Regarding the last point, the TPS had initially refused to translate the investigation report into French. It was the OIPRD that arranged for translation. In response to the case reviewer's recommendation, the Director ensured Ms. Boua had received a French copy of the report and offered an opportunity for her to make further submissions. However, he did not provide any reasons in his decision addressing the remainder of the triage recommendations. There is no other reference in his reasons to the multiple concerns raised about Ms. Boua not being properly understood during the TPS investigation.

[27] Understanding and having one's language understood by the decision-maker is an important part of the right to be heard. In *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549, at p. 577, Beetz J. emphasized that the right to be understood is required for a fair hearing, stating as follows:

> The common law right of the parties to be heard and understood by a court and the right to understand what is going on in court is not a

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> language right but an aspect of the right to a fair hearing. It is a broader and more universal right than language rights. It extends to everyone including those who speak or understand neither official language.
>
> See also *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, at p. 499.

[28] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, provides at para. 127 that an administrative decision-maker's reasons must meaningfully account for the central issues and concerns raised by the parties: see also *Thales DIS Canada Inc. v. Ontario (Transportation)*, 2023 ONCA 866, at paras. 96, 100.

[29] Given the importance of being understood as a component of the right to a fair hearing, the concerns Ms. Boua raised about misunderstanding and misinterpretation throughout the process should have raised a significant concern about whether the investigation adequately addressed the issues in the complaint. The Director's own triage process squarely flagged the issue and recommended the matter could not be properly reviewed on the existing record. In these circumstances, we find it was incumbent on the Director to advert to this issue in his reasons. In our view, his failure to address this issue when he decided it was unnecessary to remit the matter for Ms. Boua to be interviewed was unreasonable.

Reliance on Having Received Ms. Boua's Review Submissions

[30] Second, we find the Director's decision to be unreasonable in his reliance on having received Ms. Boua's submissions on the request for review. As set out above, he stated it was not necessary to remit the matter for Ms. Boua to be interviewed since he had "the benefit of Ms. Boua's detailed complaint and her submissions on this review". But on questioning during the hearing of this application, and subsequent written submissions received from the Director, it became clear that the Director had not read Ms. Boua's submissions themselves, which were submitted in French.

[31] The Director submits this oversight is not fatal. In his submission, it was unnecessary for the OIPRD to translate Ms. Boua's submissions into English because the OIPRD counsel assisting the Director on the request for review was fluently bilingual and reviewed and summarized the French submissions and evidence for the benefit of the Director.

[32] We do not accept that receiving a summary of the submissions is sufficient in the specific circumstances of this case. The OIPRD has not produced the summary itself because it was included in a document that also contained legal advice. We do not fault them for claiming privilege over the document but there is no way to know the length of or degree of detail provided in the summary.

[33] *Vavilov* explains, at para. 126, that a reasonable decision is one that is justified in light of the facts. The reasonableness of a decision may be jeopardized where a decision-maker has fundamentally misapprehended or failed to account for the evidence before it.

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[34] Ms. Boua's submissions on the request for review consist of approximately eight dense, single-spaced pages. They appear to be roughly twice as long as her initial complaint. They expand on some of her allegations and raise new issues. For example, in her submissions, she raises concerns about the TPS investigation, including that Mr. Anderson was not comprehensively interviewed. She also raises concerns about the TPS report, such as the officers' reliance on different charges for her arrest *ex post facto*.

[35] Ms. Boua also expands on the events of the evening in question, for example, raising *Charter* rights not to be deprived of her liberty and her right to counsel. She further states that the police had an obligation to serve her in the language of her choice. Although the Director submits his decision demonstrates he had reviewed her submissions, the only new submission that he addresses is her allegation that she was denied the opportunity to speak with counsel.

[36] We fully accept the Director did not have an obligation to address each of Ms. Boua's new allegations. The problem is the Director relies on having Ms. Boua's submissions to say she did not need to be interviewed. But he did not review the submissions themselves and there is no way of knowing whether the summary he received was detailed given his decision does not recount many of the new submissions.

[37] In a circumstance where there was a serious concern that Ms. Boua had not been properly understood during the investigation because of language barriers, it was unreasonable for the Director to dismiss the question of whether Ms. Boua should be interviewed by saying he had her submissions when in fact he had not read and was not able to understand those submissions. We consider his reliance on the submissions in these circumstances to constitute a failure to account for a key consideration on the record before him.

[38] The Director's reliance on *Sommers v. Ontario Civilian Commission on Police Services* (2005), 197 O.A.C. 203 (Div. Ct.), at paras. 26-28 is misplaced. In that case, the court found the commission did not breach procedural fairness by relying on a case summary that was not disclosed to the applicant police officer. The issue here is not the use of a case summary, nor whether it was disclosed to Ms. Boua. The issue is having only a summary of Ms. Boua's submissions when there were repeated concerns about whether Ms. Boua was properly understood and where the Director relied on her submissions as justification for not requiring her to be interviewed.

[39] An additional reason the Director provided for not remitting the matter to the TPS is that he had a copy of the ICCS recording. We note that the recording only contained an audio and not a visual recording. Regardless, we do not consider the availability of the audio recording to be sufficient to override our concerns with the Director's failure to advert to the language issues and to review Ms. Boua's submissions.

What is the appropriate remedy?

[40] The appropriate remedy in most cases where a reviewing court finds a decision to be unreasonable is to remit the matter to the administrative decision-maker: *Vavilov*, at para. 141. In this case, our concerns about the Director's decision centre on his failure to address questions of

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procedural fairness caused by language issues in the underlying investigation. In these circumstances, it is particularly appropriate to remit the matter to the Director so that the question of procedural fairness can be comprehensively considered and addressed. Given that the procedural rights afforded to Ms. Boua are in issue, we have not addressed the balance of her substantive submissions on this application.

[41] Therefore, the application is allowed, and the matter shall be remitted to the Director to be considered in accordance with these reasons.

[42] Ms. Boua filed a bill of costs seeking costs of $14,118. Although she was not represented by counsel at the hearing, she included $7,500 for lawyer fees, as well as $5,000 for the forensic expert fees related to the information we did not admit as evidence. Overall, we accept that Ms. Boua incurred legal fees and expenses other than those associated with the expert fees. Since she was self-represented at the hearing and she was unsuccessful on the motion, we consider costs in the overall amount of $5,000 to be reasonable. Therefore, the OIPRD shall pay costs of $5,000 to Ms. Boua.

"Nishikawa, J."

"O'Brien, J."

"Leiper, J."

Released: April 18, 2024

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Applicant

- and -

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